UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MICROSOFT CORPORATION

and **Case 19-CA-162985**

TEMPORARY WORKERS OF AMERICA

ORDER[1]

The petition to revoke subpoena duces tecum B-723981, filed by Microsoft Corporation, is denied.[2] The subpoena seeks information relevant to the matter under investigation and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations.[3] Further, the Petitioner has failed to establish any other legal basis for

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[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] In denying the petition, we consider the subpoena as clarified by the Region's opposition, which states that the term "supplier" in par. 2 is not intended to include outside counsel.

[3] To the extent that the Petitioner asserts that no responsive documents exist for certain subpoena paragraphs, we note that the subpoena cannot compel the Petitioner to produce documents that it does not possess. However, the subpoena does compel the Petitioner to conduct a thorough search for all of the requested information. If the information is found, it must be produced. If the information cannot be found, the Petitioner must affirmatively represent to the Region that no responsive documents exist.

Contrary to our colleague, as discussed at greater length in the Board's Order in *Dolchin Pratt, LLC d/b/a Jimmy John's Gourmet Sandwiches*, 05-CA-135334 (Nov. 6, 2015), we find that the subpoena lies well within the scope of the Board's broad investigative authority, which extends not only to the substantive allegations of a charge, but to "*any* matter under investigation or in question" in the proceeding. 29 U.S.C. § 161(1) (emphasis added); Sec. 102.31(b) of the Board's Rules. Moreover, nothing in Sec. 11 of the Act or Sec. 102.31(b) of the Board's Rules can be read to impose a requirement that the Regional Director articulate "an objective factual basis" in order to compel the production of information that is necessary to investigate a pending unfair labor practice charge. Nor can such a requirement be justified on the basis of Sec. 10054.4 of the Board's Casehandling Manual, which does not relate to or mention subpoenas.

revoking the subpoena. See generally *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).

Dated, Washington, D.C., July 19, 2016.

KENT Y. HIROZAWA, MEMBER

LAUREN MCFERRAN, MEMBER

Member Miscimarra, dissenting in part:

Consistent with Sec. 11(1) of the Act and Sec. 102.31(b) of the Board's Rules and Regulations, as stated in my dissent in *Dolchin Pratt, LLC d/b/a Jimmy John's Gourmet Sandwiches*, 05-CA-135334 (Nov. 6, 2015), I believe that a subpoena seeking documents pertaining to an alleged joint-employer and/or single-employer status of a charged party "requires more . . . than merely stating the name of a possible single or joint employer on the face of the charge." Id. at 3. In particular, the General Counsel must be able to articulate "an objective factual basis supporting such an inquiry." Id. at 4–5. Cf. Casehandling Manual Sec. 10054.4 (stating that "additional and more complete evidence, including all relevant documents," should be obtained if "consideration of the charging party's evidence and the preliminary information from the charged party *suggests a prima facie case*") (emphasis added).

Here, the charge alleging an unlawful failure and refusal to bargain refers to Microsoft Corporation and Lionbridge Technologies as a "joint employer," without additional, factual information about the joint employer allegation. Thus, applying the above-mentioned principles, I would find that the General Counsel has failed to articulate an objective factual basis for subpoenaing documents regarding the possible

joint employer relationship between Microsoft Corporation and Lionbridge Technologies. I would therefore grant the petition with respect to the paragraphs that seek information regarding joint employer status, without prejudice to the ability of the General Counsel to issue a new subpoena seeking this information, if he can establish an objective factual basis supporting such an inquiry, beyond the mere allegation in the charge that Microsoft Corporation and Lionbridge Technologies are a joint employer.[4]

Dated, Washington, D.C., July 19, 2016.

PHILIP A. MISCIMARRA, MEMBER

[4] As I have stated elsewhere, I do not agree with the Board's revised standard for assessing joint-employer status under the Act. See *BFI Newby Island Recyclery (Browning-Ferris Industries of California)*, 362 NLRB No. 186, slip op. at 21-50 (2015) (Members Miscimarra and Johnson, dissenting).